



Kentucky Law Journal

Volume 79 | Issue 4

Article 7

1991

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Recommended Citation

Wier, Robert E. (1991) "Troubled Waters: A Reaction to the Eleventh Circuit's Pollution of CERCLA's Safe Harbor for Lenders," *Kentucky Law Journal*: Vol. 79 : Iss. 4 , Article 7.
Available at: <https://uknowledge.uky.edu/klj/vol79/iss4/7>

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Troubled Waters: A Reaction to the Eleventh Circuit's Pollution of CERCLA's Safe Harbor for Lenders

INTRODUCTION

Congress, responding to the increasing dangers presented by improper hazardous waste disposal, passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act") in 1980.¹ This Act, the ultimate coalescence of three bills formerly considered in either the House of Representatives or the Senate,² emerged from eleventh-hour compromises in the last days of the final session of the Ninety-sixth Congress.³

In pursuit of the Act's salutary goals, and in deference to Congress' intended liberal interpretation,⁴ courts have construed and applied CERCLA generously.⁵ Logically, this analytic breadth has developed in a CERCLA area that readily lends itself to judicial scrutiny—private party liability.⁶

¹ 42 U.S.C. §§ 9601-57 (1982), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613-1782 (1986) (codified throughout 42 U.S.C. §§ 9601-75 (1982 & Supp. IV 1986)).

² See Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982); see also *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986) (arguing that four bills merged to form CERCLA).

³ Grad, *supra* note 2, at 1.

⁴ See *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990).

⁵ See Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821, 824 (1989).

⁶ See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (holding that corporate officers can be held liable under CERCLA without "piercing the corporate veil"); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985), *aff'd*, 763 F.2d 49 (1985) (construing CERCLA to impose strict liability with limited causation defenses); *Maryland Bank & Trust*, 632 F. Supp. at 579 (holding secured creditor exemption inapplicable to foreclosing mortgagee); *United States v. South Carolina Recycling and Disposal, Inc.*, 21 Env't Dep. Cas. 1577, 1581 (D.S.C. 1984) (holding lessee liable as "owner" of contaminated facility).

Until recently, the almost uniform judicial attitude of CERCLA expansiveness was justifiable. Through fair statutory reading and reasonable derivation of Congressional intent, courts had vigorously, but sensibly, pursued the remedial purposes contemplated by the Act.⁷ Unfortunately, the Eleventh Circuit now has deviated from responsible statutory application. In *United States v. Fleet Factors Corp.*,⁸ the Eleventh Circuit became the first to evaluate CERCLA's liability exemption for lenders.⁹ When finished with its exposition, the Eleventh Circuit effectively had transformed CERCLA's lender exemption from its intended use as a safe harbor into a dangerous morass which, like the hazardous waste dumps prompting the Act, now needs redress. In evaluating this lender exemption, the *Fleet Factors* court, so entranced by CERCLA's "remedial" purpose,¹⁰ unjustifiably disregarded the Act's clear import regarding secured creditors and rendered a decision far outside the bounds of interpretive credibility.

Initially, this Note gives a brief overview of the relationship between CERCLA liability and lenders.¹¹ Next, it assesses the predominant district court analysis of this relationship—an analysis rejected in *Fleet Factors*.¹² The Eleventh Circuit's decision then is discussed.¹³ Finally, *Fleet Factors* is critically examined to show the fault in a decision, based on an unsupportable interpretation of the Act, that will virtually guarantee substantial liability for lenders in situations plainly unintended by CERCLA's liability scheme.¹⁴

I. CERCLA LIABILITY AND SECURED CREDITORS

While Congress allocated a significant amount of federal monies to fund the operational aspects of CERCLA,¹⁵ it intended the

⁷ See *infra* notes 42-63 and accompanying text.

⁸ 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 752 (1991).

⁹ *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1556 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 752 (1991).

¹⁰ *Id.* at 1557.

¹¹ See *infra* notes 15-41 and accompanying text.

¹² See *infra* notes 42-63 and accompanying text.

¹³ See *infra* notes 64-87 and accompanying text.

¹⁴ See *infra* notes 88-111 and accompanying text.

¹⁵ See 26 U.S.C. § 9507 (1988) (establishing "Hazardous Substance Superfund" to replace "Hazardous Substance Response Fund"); 42 U.S.C. § 9631 (repealed 1986) (establishing "Hazardous Substance Response Fund").

"Superfund"¹⁶ only to guarantee an environmentally curative response. That is, CERCLA countenances the use of governmental dollars, when necessary, to correct a hazardous waste danger;¹⁷ subsequently, CERCLA's private liability provisions authorize suit for compensation from designated "responsible parties."¹⁸

Private party liability for removal and/or remedial action under CERCLA requires the establishment of four basic factors:¹⁹ 1) the existence of a "facility";²⁰ 2) the occurrence of a "release"²¹ or "threatened release"²² of a "hazardous substance";²³ 3) the incurrance of costs associated with response to the release or threatened release;²⁴ and, 4) the presence of a liable party under the terms of the Act.²⁵ This Note focuses primarily on the fourth necessary element.

CERCLA's "covered persons"²⁶ include individuals that fit the following categories:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of.²⁷

¹⁶ 26 U.S.C. § 9507.

¹⁷ 42 U.S.C. § 9611 (1982 & Supp. IV 1986).

¹⁸ 42 U.S.C. § 9607 (1982 & Supp. IV 1986) (listing parties potentially liable under the Act).

¹⁹ See, e.g., *United States v. New Castle County*, 727 F. Supp. 854, 859 (D. Del. 1989); *Maryland Bank & Trust*, 632 F. Supp. 573, 576 (D. Md. 1986).

²⁰ 42 U.S.C. § 9601(9) (1982 & Supp. IV 1986) ("'[F]acility' means (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. ").

²¹ 42 U.S.C. § 9601(22) ("'[R]elease' includes, subject to certain exceptions, 'any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). ").

²² *Id.* CERCLA does not specifically provide the meaning of "threatened." See *United States v. Northernare Plating Co.*, 670 F. Supp. 742, 747 (W.D. Mich. 1987), *aff'd*, 889 F.2d 1497 (1987) (discussing a threatened release).

²³ 42 U.S.C. § 9601(14) (providing multiple cross-references to other environmental statutes for definition of "hazardous substance").

²⁴ Though CERCLA does not define "response costs," the Act does define "respond" and "response." See 42 U.S.C. § 9601(25) ("'[R]espond' or 'response' means remove, removal, remedy, and remedial action[;] all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.'").

²⁵ See *infra* notes 26-27 and accompanying text.

²⁶ 42 U.S.C. § 9607.

²⁷ *Id.*

The Act sanctions parties covered by these provisions with joint and several,²⁸ strict liability,²⁹ subject only to the limited affirmative defenses afforded by the Act.³⁰

Crucial to the scope of the aforementioned provisions, and central to this discussion, is the meaning of "owner and operator"³¹ Typical of the drafting which has elicited criticism from courts and commentators,³² CERCLA's definitional section denotes, in relevant part,

The term "owner or operator"³³ means (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility³⁴

This provision's obvious circularity has not been lost on the courts in their struggle to apply its difficult language.³⁵ Actually, the section's exempting language seems to offer more guidance as to the meaning of the term "owner or operator" than does the definitional language itself.³⁶ Although complicated by structural

²⁸ See *Rockwell Int'l Corp. v. UI Int'l Corp.*, 702 F. Supp. 1384, 1389 (N.D. Ill. 1988); 42 U.S.C. § 9613(f) (1982 & Supp. IV 1986) (providing means for seeking contribution for persons adjudged liable under § 9607).

²⁹ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); 42 U.S.C. § 9601(32) (referring to Clean Water Act (33 U.S.C. § 1321), which has been held to impose strict liability, as defining CERCLA liability standard).

³⁰ See 42 U.S.C. § 9607(b) (providing defenses when release or threatened release is caused solely by "(1) an act of God; (2) an act of war; (3) an act or omission of a third party," assuming that no contractual relationship exists between the defendant and third party, the defendant exercised due care, and the defendant guarded against foreseeable results from the third party's acts or omissions); *Shore Realty*, 759 F.2d at 1042.

³¹ Although 42 U.S.C. § 9607 includes conjunctive "owner and operator" language, courts have determined the correct construction to be the disjunctive "owner or operator" found in 42 U.S.C. § 9601(20)(A). See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 752 (1991).

³² See *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (3rd Cir. 1988) ("CERCLA is not a paradigm of clarity or precision Problems of interpretation have arisen from the Act's use of inadequately defined terms. "); Grad, *supra* note 2, at 2 ("[A] hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law.").

³³ See *supra* note 31 and accompanying text.

³⁴ 42 U.S.C. § 9601(20)(A).

³⁵ See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988) ("This [language] is circular, although it does imply that if Mena is neither 'onshore' or 'offshore'—perhaps because in outerspace?—then an owner or operator is not a statutory 'owner or operator' ").

³⁶ See *infra* notes 98-111 and accompanying text.

shortcomings, one truth must remain as the interpretive underpinning of the "owner or operator" definition: Congress intended to exempt qualifying lenders from the potential liability that attaches when labelled an "owner or operator" under CERCLA.³⁷

The question thus begged is the exemption's scope. To be insulated from liability, a secured creditor must fulfill the conditions set forth in the exemption. A lender's ownership interest must be held "primarily to protect his security interest in the vessel or facility."³⁸ This condition seems the very definition of a secured creditor, envisioning ownership status of the subject party in a narrowly defined capacity.³⁹ Further, a lender must abstain from participation in the "management of a . . . facility."⁴⁰ Though perhaps a bit more open-ended than the former condition, this qualification undoubtedly addresses operational, as opposed to ownership participation by the party seeking exemption.

The Act's lender exemption logically insulates lenders from liability in the two areas around which CERCLA liability revolves—owner liability and operator liability. Unfortunately, the Eleventh Circuit's failure to note this duality, in *United States v Fleet Factors Corp.*,⁴¹ resulted in an exemption structure for lenders far different from the ones formulated by the various district courts that have faced the question, and far different from the one intended by Congress in enacting CERCLA.

II. *UNITED STATES V. MIRABILE* AND ITS PROGENY: DISTRICT COURT EXEMPTION INTERPRETATION

In *United States v Mirabile*,⁴² the initial district court to interpret CERCLA's secured creditor exemption⁴³ yielded a decision roundly endorsed by other district courts subsequently facing the exemption issue.⁴⁴ In *Mirabile*, the United States sought CERCLA compensation from the current owners of property upon

³⁷ 42 U.S.C. § 9601(20)(A).

³⁸ *Id.*

³⁹ See U.C.C. § 9-105 (1972) ("Secured party" means a lender, seller or other person to whom accounts, contract rights or other chattel paper have been sold.").

⁴⁰ 42 U.S.C. § 9601(20)(A).

⁴¹ 901 F.2d at 1550.

⁴² 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985).

⁴³ *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994, 20995 (E.D. Pa. 1985).

⁴⁴ See *infra* note 61.

which a release of hazardous substances had occurred. The exemption analysis arose because of the defendants' third party complaints against various lenders. The defendants alleged that the lenders' activities in relation to the owner of the site at the time of contamination would establish liability against the lenders for "creation of the hazardous conditions" at the site.⁴⁵

As previously noted,⁴⁶ and as shown in *Mirabile*,⁴⁷ the scope of the exemption language comprises the critical inquiry when applying the secured creditor exemption. In *Mirabile*, it apparently was obvious that the lenders involved satisfied the ownership prong of the exemption by possessing ownership attributes primarily to protect a security interest.⁴⁸ Operational values presented the contended point. The court framed the issue clearly: "[T]he exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs."⁴⁹

The *Mirabile* court based its interpretation on CERCLA's perceived normative justification: "[I]n enacting CERCLA Congress manifested its intent to impose liability upon those who were responsible for and profited from improper disposal practices."⁵⁰ Since CERCLA targeted the party or parties actually responsible for the creation of a hazardous waste danger, the court reasoned that only actual control by a person could result in liability under the Act.⁵¹ Thus, "it would appear that before a secured creditor may be held liable, it must, at a minimum, participate in the *day-to-day* operational aspects of the site."⁵²

To the court, the distinction between such functional involvement in management and financial participation was "critical."⁵³ Indeed, the court, by comparison, indicated the equitable difference between financial and operational involvement. Operational participation—in which a person actually partakes in the "nuts-and-bolts"⁵⁴ conduct of a facility—justifies the imposition of

⁴⁵ *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20995.

⁴⁶ See *supra* notes 31-37 and accompanying text.

⁴⁷ *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20994.

⁴⁸ *Id.* at 20995.

⁴⁹ *Id.*

⁵⁰ *Id.* at 20996.

⁵¹ *Id.*

⁵² *Id.* (emphasis added).

⁵³ *Id.* at 20995.

⁵⁴ *Id.*

liability on the theory that such a participant is realistically responsible for the dangerous condition created. Financial participation—in which a person has no involvement in a site's “nuts-and-bolts” management—does not justify the imposition of liability, resting on a more attenuated, putative standard of site control.⁵⁵

The court buttressed its standard of operational rather than financial involvement with a specific textual example from the exemption. The exemption's language offers protection to a secured creditor not participating in the management of a “facility”⁵⁶ The *Mirabile* court convincingly seized on CERCLA's categorical language:

The reference to management of the “facility,” as opposed to management of the affairs of the actual owner or operator of the facility, suggests once again that the participation which is critical is participation in operational, production, or waste disposal activities. Mere financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case is not, in my view, sufficient for the imposition of liability.⁵⁷

In reaching its decision on the scope of CERCLA's secured creditor exemption, the court heard numerous policy arguments relating to the effects of its interpretation. The court expressly acknowledged the strong governmental interest in recovering response costs.⁵⁸ While recognizing this interest, an interest which surely pervades CERCLA,⁵⁹ the court properly restricted its role to applying, rather than expanding, the Act:

Obviously, imposition of liability on secured creditors or lending institutions would enhance the government's chances of recovering its cleanup costs. It may well be that the imposition of such liability would help to ensure more responsible management of such sites. The consideration of such policy matters, and the decision as to the imposition of such liability, however, lies with Congress. In enacting CERCLA Congress singled out secured creditors for protection from liability under certain circumstances.⁶⁰

⁵⁵ *Id.*

⁵⁶ 42 U.S.C. § 9601(20)(A) (1982 & Supp. IV 1986).

⁵⁷ *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20995.

⁵⁸ *Id.* at 20996.

⁵⁹ See *supra* notes 17-18 and accompanying text.

⁶⁰ *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20996.

In casting initial judicial light on CERCLA's secured creditor exemption, the court adhered to the statutory language and the intent manifested by Congress, rather than pursuing with unbri-dled vigor any suspect party. Subsequent courts have followed its interpretive lead without substantial alteration.⁶¹ Indeed, the district court decision in *United States v. Fleet Factors Corp.*⁶² embodied and perhaps even extended *Mirabile's* spirit, holding the exemption "to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability."⁶³

III. THE ELEVENTH CIRCUIT'S EXEMPTION INTERPRETATION

In *United States v. Fleet Factors Corp.*⁶⁴ the Eleventh Circuit, reviewing the district court's summary judgment decision, became the first court of appeals to address the scope of CERCLA's secured creditor exemption.⁶⁵ Fleet Factors, the defendant targeted for CERCLA liability, entered into a factoring agreement with a textile company that operated at the "facility" in issue. Under this agreement, Fleet Factors advanced funds to the textile company in exchange for the company's accounts receivable. This advance, secured by a deed of trust from the company to Fleet Factors, gave Fleet Factors a security interest in both the facility itself and in various equipment, assets, and inventories.⁶⁶

The textile business ultimately failed, bankrupting the debtor. Fleet Factors, its advanced funds not fully reimbursed by the collection of assigned accounts receivable, foreclosed on some of the inventory and assets on which it held the deed of trust. Subsequently, the Environmental Protection Agency discovered

⁶¹ See *Guidice v. BFG Electroplating and Mfg. Co.*, 732 F. Supp. 556, 562-63 (W.D. Pa. 1989); *United States v. Nicolet*, 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989); *Rockwell Int'l Corp. v. Int'l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988); *Coastal Casting Serv., Inc. v. Aron*, No. H-86-4463 (S.D. Tex. Apr. 18, 1988) (WESTLAW, Allfeds library).

⁶² 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd on other grounds*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 752 (1991).

⁶³ *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 960 (S.D. Ga. 1988), *aff'd on other grounds*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 752 (1991).

⁶⁴ 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 752 (1991).

⁶⁵ *Id.* at 1556.

⁶⁶ *Id.* at 1552.

the presence of improperly stored toxic chemicals, as well as large amounts of asbestos, at the facility. The EPA spent about \$400,000 responding to the threat; it then sought recovery of costs from various parties, including Fleet Factors.⁶⁷

The court's secured creditor exemption interpretation arose from Fleet Factors's involvement with the facility.⁶⁸ As in *United States v. Mirabile*,⁶⁹ the exemption did not focus on the "indicia of ownership." Rather, Fleet Factors's attempt to invoke the secured creditor exemption turned on the provision's second qualification: "The critical issue is whether Fleet participated in management sufficiently to incur liability under the statute."⁷⁰

The court began with the predictable, incanting CERCLA's "essential policy" of penalizing "those responsible for problems caused by the disposal of chemical poison."⁷¹ Not surprisingly, the adversaries offered polarized exemption interpretations. The government argued for loss of exemption when a lender participates "in any manner in the management of a facility."⁷² Fleet Factors responded with the standard announced in *United States v. Mirabile*,⁷³ and followed by the trial court, which drew the protective line at "day-to-day operational management of a facility."⁷⁴

Considering the standard ultimately adopted, the court exhibited ironic solicitousness for lenders in rejecting the government's virtual *per se* approach. The court remarked that such a rule "would largely eviscerate the exemption Congress intended to afford secured creditors . . . [and] could expose all such lenders to CERCLA liability for engaging in their normal course of business."⁷⁵

The court also refused to follow the *Mirabile* standard.⁷⁶ The court prefaced this departure with a firm announcement of its self-imposed task: "In order to achieve the 'overwhelmingly re-

⁶⁷ *Id.* at 1552-53.

⁶⁸ *Id.* at 1555-56.

⁶⁹ 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20992 (E.D. Pa. 1985).

⁷⁰ *Fleet Factors*, 901 F.2d at 1556.

⁷¹ *Id.* at 1553 (quoting *Florida Power & Light v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990)).

⁷² *Id.* at 1556.

⁷³ 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985).

⁷⁴ *Fleet Factors*, 901 F.2d at 1556; see also *supra* notes 42-63 and accompanying text.

⁷⁵ *Fleet Factors*, 901 F.2d at 1556.

⁷⁶ *Id.* at 1557.

medial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed *to favor liability* for the costs incurred by the government in responding to the hazards at such facilities.''⁷⁷

Although implying ambiguity in CERCLA's secured creditor exemption,⁷⁸ the court purported to reject the *Mirabile* standard, claiming it "ignores the plain language of the exemption and essentially renders it meaningless."⁷⁹ To the Eleventh Circuit, a rule requiring operational participation by the lender in order to forfeit exemption protection would amount to a judicially constructed redundancy.

Individuals and entities involved in the operations of a facility are *already liable as operators*. Had Congress intended to absolve secured creditors from *ownership* liability, it would have done so. Instead, the statutory language chosen by Congress explicitly holds secured creditors liable if they participate in the management of a facility.⁸⁰

Based on this theory, lenders who fulfill the *Mirabile* operational standard already have achieved "operator" status, with attendant liability attaching. The court then created a lesser rule for judging the level of management participation necessary to destroy the statutory exemption:

Under the standard we adopt today, a secured creditor may incur liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. [Stated another way,] a secured creditor will be liable if its involvement is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.⁸¹

The court supported its "narrow construction"⁸² of CERCLA's lender exemption by referring to the Act's "sparse"⁸³

⁷⁷ *Id.* (emphasis added) (footnote omitted) (quoting *Florida Power & Light*, 893 F.2d at 1317).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (emphasis added).

⁸¹ *Id.* at 1557-58 (footnotes omitted).

⁸² *Id.* at 1558 n.11.

⁸³ *Id.*

pertinent legislative history The history quoted in the case suggested the reasoning behind the exemption:

This change [the insertion of the exemption] is necessary because the original definition inadvertently subjected those who hold title to a facility, but do not participate in the management or operation *and are not otherwise affiliated* with the person leasing or operating the facility, to the liability provisions of the bill.⁸⁴

The *Fleet Factors* court reasoned that the word "affiliated" necessitated a standard of liability based on "a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator."⁸⁵

After announcing its putative control standard, based solely on financial involvement, the court tersely addressed the possible adverse effects such a decision might have on lenders. In summarily justifying any negative effects, the court argued that a low exemption standard would give "strong incentive"⁸⁶ for close oversight and thus foster compliance with proper disposal practices. Further, in the court's estimation, lenders could treat added risk of liability as a cost of doing business, by "weigh[ing] [such risks] into the terms of the loan agreement,"⁸⁷ in pursuit of their newly imposed role as toxic police.

IV. A CRITIQUE OF THE ELEVENTH CIRCUIT'S ANALYSIS

The beneficial purposes underlying CERCLA are clear. Improper disposal and storage of hazardous wastes presents risks that imperil all of society by threatening the quality of water, soil, and air.⁸⁸ Likewise, CERCLA's normative aim of pinning liability on those responsible for the creation of a hazardous waste threat is admirable.⁸⁹ These truths resist contention. Yet, the pursuit of these goals must lie within the legislative judgment of Congress, embodied within the statute. In *United States v Fleet*

⁸⁴ *Id.* (quoting 2 SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97th Cong., 2d Sess., 2 *A Legislative History of the CERCLA* 945 (Comm. Print 1983) (remarks of Rep. Harsha)).

⁸⁵ *Id.* at 1558 n.11.

⁸⁶ *Id.* at 1559.

⁸⁷ *Id.* at 1558.

⁸⁸ See Grad, *supra* note 2, at 7.

⁸⁹ 42 U.S.C. § 9607 (1982 & Supp. IV 1986) (listing parties potentially liable under the Act).

Factors Corp.,⁹⁰ the Eleventh Circuit facially ignored Congress's judgment regarding lender CERCLA liability and fashioned a standard completely incompatible with the language and import of the Act.

In seeking to define the critical "participation in management" standard of the CERCLA exemption, the court characterized the Act as ambiguous.⁹¹ Any ambiguity results exclusively from the court's reading of the Act. CERCLA imposes liability on two nonexclusive classes of parties—owners and operators.⁹² For these purposes, a person *must be either an owner or an operator of a facility* to be liable. With equal clarity, CERCLA's secured creditor exemption precludes the label of owner or operator from attaching to lenders who comply with its conditions.⁹³ The Eleventh Circuit's evaluation of this scheme missed, or ignored, the critical observation that the exemption encompasses both owners and operators. Recall the exemption's language: "Such *term* [owner or operator] *does not include* a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."⁹⁴

Seemingly oblivious to this explicit language, the court baldly asserted,

The government correctly formulates this issue [Fleet's liability] as being comprised of two distinct, but related, means of finding Fleet liable. First, Fleet is liable if it operated the facility. Alternatively, Fleet can be held liable if it had an indicia of ownership and managed the facility to the extent necessary to remove it from the secured creditor liability exemption.⁹⁵

The court clearly saw the exemption as applying only to potential "owner" liability;⁹⁶ this reading is plainly erroneous. Instead of validly decrying a redundancy imposed by the court in *United*

⁹⁰ 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 752 (1991).

⁹¹ See *supra* notes 78-79 and accompanying text.

⁹² See *supra* notes 26-27 and accompanying text.

⁹³ See *supra* note 34 and accompanying text.

⁹⁴ 42 U.S.C. § 9601(20)(A) (1987 & Supp. IV 1986) (emphasis added).

⁹⁵ *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1556 n.6 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 752 (1991).

⁹⁶ See *id.*, see also *supra* note 80 and accompanying text (explicit rejection of exemption application to operator status).

States v Mirabile,⁹⁷ the Eleventh Circuit's refusal to read the exemption as pertaining to the definition of both "owners" and "operators" amounts to the creation of a redundancy that would not exist in an accurate reading of CERCLA.

The court's fallacious conclusion that the exemption applied only to "owner" status necessitated tortured analysis. For example, "[a]lthough similar, the phrase 'participation in the management' and the term 'operator' are not congruent."⁹⁸ To the contrary, the conditions placed within the secured creditor exemption—ownership indicia held primarily for the purpose of protecting a security interest and non-participation in facility management—apparently provide the definitional substance of "owner" and "operator," which is so lacking in the statute's circular description.⁹⁹ Hence, to own a facility is to hold ownership indicia for purposes other than security interest protection. Likewise, to operate a facility is to participate in its management.

Such reasoning finds support in the very legislative history inappropriately relied on by the court.¹⁰⁰ The court read the reference of "those who hold title to a . . . facility but do not participate in the management or operation and *are not otherwise affiliated with the* . . . facility"¹⁰¹ as supporting an exemption standard lower than that in the statutory definition of "owner or operator" status.¹⁰² Instead, the other affiliation referred to should be read as addressing instances referred to in the statute in which "ownership indicia" is not held primarily for the protection of a security interest.¹⁰³ In this way, lenders would forfeit exempt status by being statutory "owners or operators" instead of mere secured creditors.

The harm in the Eleventh Circuit's fallacious statutory construction is shown in the fantastic legal relationships created by

⁹⁷ 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994, 20995-96 (E.D. Pa. 1985). For a discussion finding an inherent circularity and redundancy in the CERCLA's definition of "owner and operator," see *supra* notes 31-41.

⁹⁸ *Fleet Factors*, 901 F.2d at 1557.

⁹⁹ See *supra* notes 31-37 and accompanying text.

¹⁰⁰ See *supra* notes 83-85 and accompanying text.

¹⁰¹ *Fleet Factors*, 901 F.2d at 1557 (quoting 2 SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97th Cong., 2d Sess., 2 *A Legislative History of the CERCLA* 945 (Comm. Print 1983) (remarks of Rep. Harsha)).

¹⁰² "Owner or operator" is defined at 42 U.S.C. § 9601(20)(A); see also *supra* notes 33-41 and accompanying text.

¹⁰³ The statutory exemption for those holding an indicia of ownership primarily to protect a security interest is found at 42 U.S.C. § 9601(20)(A); see also *supra* notes 33-41 and accompanying text.

the decision. In the Eleventh Circuit, liable parties under CERCLA now include owners, operators, and lenders *who neither own nor operate*, but whose financial involvement supports an inference of putative hazardous waste control. Amazingly, this new class created in *Fleet Factors* is actually more vulnerable to compensation liability than the two classes actually envisioned by the Act.

To pursue a person as the "owner" or "operator" of a facility, the government or other party seeking compensation for CERCLA costs must prove actual ownership or operation by that person. Regarding ownership, CERCLA imposes liability regardless of any consideration of management participation.¹⁰⁴ Extrapolating from the exemption's language, a CERCLA owner is a person who holds ownership indicia for a primary purpose other than protection of a security interest. Thus a lender holding such a non-exempt ownership interest would be liable as an owner, irrespective of management participation.

Operator liability is more problematic. Again relying on the exemption language, an operator is a person participating in the management of a facility. The imposition of operator liability has uniformly turned on a high level of actual, operational participation in the affairs of a facility.¹⁰⁵ Indeed, in *United States v*

¹⁰⁴ Since liability can attach to either an owner or operator, it is obvious that a person could own and thus be liable with absolutely no management participation. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (CERCLA "imposes strict liability on the owner of a facility without regard to causation.").

¹⁰⁵ See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157-158 (7th Cir. 1988) (The court noted that the statute's circularity suggested that the "ordinary meaning" of the term "operator" should control. Then it invoked common law doctrines of independent contractor and joint venturer liability to set a high involvement and control standard of operator liability.); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1989) (The court approved the imposition of liability on corporate officers, without disregarding the corporate entity, arguing that CERCLA supports direct "operator" liability for "corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances." The implication is a need for such involvement for the imposition of operator liability.); *Shore Realty*, 759 F.2d at 1052 (holding corporate officer "in charge of the operation of the facility in question" liable as operator); *United States v. Consolidated Rail Corp.*, 729 F. Supp. 1461, 1468 (D. Del. 1990) ("Although interpreted broadly, the statute [CERCLA] requires that a person be actively participating in the management of the facility to be held liable for the disposal of hazardous wastes." The court conditioned operator liability on "an active role in the operation of the site" and "control of the hazardous substances being processed."); *United States v. Carolawn Co.*, 21 ERC 2124, 2131 (D.S.C. 1984) (imposing operator liability based on an individual's "control or authority over the activities of a facility from which hazardous substances are released.").

Kayser-Roth,¹⁰⁶ a case cited in *Fleet Factors* for its enumeration of operator liability criteria,¹⁰⁷ the court stressed "practical total control"¹⁰⁸ and "pervasive control,"¹⁰⁹ as factors in determining the existence of operator status. *Rockwell Int'l Corp. v. UI Int'l Corp.*¹¹⁰ further typifies the notion that high level operational participation is the benchmark for operational classification:

Thus, "only those who actually operate or exercise control over the facility that creates an environmental risk can be held liable" Mere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach.¹¹¹

The Eleventh Circuit's lender participation standard is conceptually incogitable. Lenders who would not be liable as owners (since they hold ownership indicia primarily to protect a security interest) and would not be liable as operators (since they do not actively participate in the operational aspects of facility management) can be held liable under a hybrid liability test of putative control based on inferences drawn exclusively from financial participation.

CONCLUSION

In its interpretation of CERCLA's secured creditor exemption the Eleventh Circuit misperceived the issue before it. Its task was to expound an *exemption*—a safe harbor included in CERCLA for the express purpose of protecting lenders. Instead of defining this CERCLA provision with an eye toward exemption, the court expanded the liability of lenders beyond that imposed on owners or operators—CERCLA's liability foci. This result will lead lenders to say "thanks but no thanks" to the exemption itself.

Although attempting to rely on normative justification in its decision,¹¹² the Eleventh Circuit ignored the fairness inherent in

¹⁰⁶ 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990).

¹⁰⁷ *Fleet Factors*, 901 F.2d at 1557 n.10.

¹⁰⁸ *United States v. Kayser-Roth*, 724 F. Supp. 15, 22 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990).

¹⁰⁹ *Id.*

¹¹⁰ 702 F. Supp. 1384 (N.D. Ill. 1988).

¹¹¹ *Rockwell Int'l Corp. v. UI Int'l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) (quoting *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 657 (N.D. Ill.), *aff'd*, 861 F.2d 155 (7th Cir. 1988)).

¹¹² See *supra* note 71 and accompanying text.

exempting lenders under CERCLA's scheme. Lenders who are not also owners or operators simply do not have the proprietary stake or practical control that warrants liability Congress recognized this; the Eleventh Circuit did not.

The exemption inserted by Congress should be read as an affirmation of CERCLA's basic liability structure. That is, the exemption affirmatively states what should be otherwise apparent under the Act. Lenders who own should be liable as owners; lenders who operate should be liable as operators. But lenders who neither own nor operate should be exempt. Congress used the Act's exemption to underscore this normative judgment, a judgment tacitly recognized, but overtly ascribed to, in *United States v. Mirabile*.¹¹³

CERCLA unequivocally espouses the pursuit of liable parties as an end; the means to this end (the results of Congress's evaluation of the relative culpabilities of involved parties) lie within the Act. The judiciary's role should be limited to implementation of this statutory model. Thus:

To the point that courts could achieve "more" of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices.¹¹⁴

The impact of the Eleventh Circuit's over-zealous CERCLA interpretation may be great. Greater oversight from lenders involved in suspect areas will surely result. At a minimum, lenders will proceed into areas involving the presence of hazardous substances with heightened caution. Indeed, those lenders not yet involved in potentially dangerous industries would be foolish not to think twice about participating in such ventures. Indirectly, manufacturers and other industrial parties will either face difficulty in acquiring financing, or will acquire financing on burdensome terms. Congress, as evidenced by its inclusion of CERCLA's safe harbor for lenders, neither authorized nor envisioned such results. The Eleventh Circuit, by polluting this safe harbor, un-

¹¹³ 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994, 20995 (E.D. Pa. 1985).

¹¹⁴ *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988).

justifiably superseded a clear legislative judgment, leaving lenders in an unwarrantedly precarious position.

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